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IN THE

# Supreme Court of the United States

October Term, 1947
No. 213

E. J. STANTON & SON,

*Plaintiff and Respondent,*

*vs.*

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

*Defendants and Appellants.*

**Petition for Writ of Certiorari to the Honorable District Court of Appeal, Second Appellate District, of the State of California, and Brief in Support Thereof.**

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**Petition for Writ of Certiorari to the Honorable District Court of Appeal of the State of California, Second Appellate District.**

*To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully shows as follows:

**Summary and Short Statement of Matter Involved.**

Your petitioner is, and for upwards of 40 years last past, has been a corporation, organized under the laws of California, with its principal place of business, as an importer and wholesale of lumber, in the County of Los Angeles. Defendant City of Los Angeles is a municipal corporation and defendant County of Los Angeles is a political division of the State of California. Both are vested with taxing powers. The three causes consolidated for trial and decision, arose out of execution of said tax-

ing powers on lumber imported from foreign lands. The decision was exclusively upon a federal question of great importance, alike to importers and to taxing authorities of the State.

Taxes for general city and county purposes were assessed and levied by the Los Angeles County Tax Assessor upon hardwood lumber, owned and imported by petitioner from the Philippines, and various foreign countries. There were a total of 217,681 pieces of a value of $181,-154.01, which were assessed at $72,422.69 and taxes levied and paid of $2,980.57. Three tax dates are mentioned, respectively, the first Monday in March in the years 1939, 1940 and 1941. Payment under protest was made as to the 1940 and 1941 taxes and claim was made for repayment of the 1939 tax. The protest and claim respectively specifies that the assessment and tax levy was void as the lumber was imported from foreign lands and was immune from State taxation, by reason of Section 10, Article 1 of the United States Constitution.

Each piece of lumber subject to this tax was air-dried, milled, graded and marked for identification in foreign lands by the exporter prior to exportation. Petitioner unloaded it from the steamship carrier, then tallied, sorted for grade, color and thickness, and stacked it in piles or bins, with protective air strips. No change was made in any piece after receipt. Sales from time to time were made from the stacks. Replenishment was made from new shipments from the same exporter, of the same grade, color and thickness. Other than this replenishment it was not intermingled with other lumber. It is this lumber remaining after sales of a part of the entire shipment, replenished as stated, which is the subject of the case at bar.

The lumber came from South and Central American countries, Australia, Siam, as well as the various exporters in the Philippine Islands. Approximately the same method was adopted as to each exportation. A general blanket order gave the quantity, price, species, grade and dimensions required. The exporter filled the order as available shipping space developed. An importation received at one time might comprise shipments from two or more different exporters. Another shipment might be broken before customs entry and a part distributed to a foreign customer.

Each shipment was accompanied by the customary ocean bills of lading, invoices, certificates of inspection, insurance and consular certificates of origin. In each of these documents the respective pieces were described by the exporter for identification and marked as shown on Exhibit A [Tr. p. ....] in accordance with sections 1481 to 1484, inclusive, of Title 19, U. S. Code. The different pieces were never packaged together but were exported, carried and received separately in the shipment.

When deposited from the ships' cranes, petitioner tallied, inspected and sorted the lumber for grade, color, species and thickness. It was then brought to the yard and stacked in bins. Lumber from each exporter was kept separate from any other. Each plank in a stack was separated from the others by laths placed at each end and middle in order to permit air circulation and avoid rot. Nothing was done as to servicing, cutting, or drying, or in any ways changing the form of any individual plank.

Sales were made from these stacks and the lumber therein was held for sale in the usual course of business. New shipments from the same origin and of the same kind,

dimension, color and grade were used to replenish stocks depleted by said sales. Each piece continued to bear its original import mark of identification and was in the original form as imported, maintained separate from any lumber from other sources. This lumber is the subject of these actions.

## Statement of Jurisdiction.

Petitioner, in its claim to the Board of Supervisors [Tr. p. ....] in its protest accompanying payments, also in its complaints [Tr. p. ....] specifically claimed the right, privilege, and immunity from State taxation of its imports of lumber from the Philippines and the foreign countries under the provisions of Article 1, Section 10, Clause 2 of the Constitution of the United States, reading as follows:

> "No state shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imports laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of Congress."

Suits were filed to recover each tax and consolidated for trial. No question as to the facts is raised. Defendants produced no evidence. Judgment was entered December 19, 1945 for recovery by petitioner of the full taxes involved. [Tr. p. .....] The finding and judgment of the trial court specifically set forth that the Federal Constitutional question was raised and determined in

favor of plaintiff. Appeal was duly made to the Supreme Court of California, which assigned the case for hearing to the District Court of Appeal. This Court on February 28, 1947, reversed the judgment of the trial court [Tr. p. ....] upon the Federal Constitutional ground as hereinafter discussed. Petition for hearing of the Supreme Court of California was duly made, which on April 17, 1947 denied this petition. [Tr. p. .....]

The decision of the District Court of Appeal approved by the California Supreme Court, devoted itself exclusively to the construction of the quoted Constitutional provision distinct from any State question, and held [Tr. p. ....]:

> "The controversy revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation."

It was the opinion of the District Court that by virtue of such sale the whole unsold shipment remaining in the hands of the importer unchanged in form becomes subject to taxation.

These actions, therefore, present a proper case for issue of Writ of Certiorari directed from this Honorable Court to the District Court of Appeal of the State of California, Second Appellate District, of California under the provisions of title 28, U. S. C., Section 344, Sub. b Judicial Code (Section 237, as amended) in order that this court may delimit the original package of import doctrine as applied to shipments of fungible merchandise.

## Questions Presented.

The questions presented to the Court in this case concisely stated are:

(1) A bulk shipment of lumber, oil paper, fertilizer or cattle in regular course of trade, is imported from foreign lands. It is composed of indivdual pieces, boxes, barrels, packages or animals according to ordinary mercantile practices. The articles comprising said shipment are identified, carried, and passed by customs as individual items. Is it the total bulk shipment or the several individual items comprising the total import which constitutes the "original package of import" within the meaning of the Constitutional provision?

(2) Consequent upon importation does the sale of any one or more of the articles of import, comprised in the total shipment, subject the other articles therein, during the time when they are held in warehouse in their original state of importation by the original owners, to state taxation?

(3) Consequent upon importation does such handling of the articles of import as is solely essential to the preservation or completion of the mercantile transaction, such as tallying, sorting or stacking, subject these articles to state taxation?

(4) Consequent upon importation does the mere offering for sale of any one or more of the articles of import subject the unsold items to state taxation?

All of the said questions were duly raised and argued by your petitioners and appellees in said District Court of Appeal.

## The Proceedings in the Trial Court.

The three cases covering the taxes for the year 1939, 1940 and 1941 were duly consolidated for trial and tried in the trial court. Evidence was produced oral and documentary, upon the part of plaintiff. The defendant submitted the case upon the evidence produced. It has been felt that the facts are sufficiently covered so that it is unnecessary to burden this court with the transcript of evidence upon the trial. The trial court ordered judgment for plaintiff upon all the cases and findings of fact and conclusions of law upon each and every of the issues raised was made by the trial court therein. The trial court held in accordance with plaintiff's theory that each of the separate articles of lumber constituted an original package of import; that inasmuch as there had been no change in any one of the original articles of import and as each of the original shipments was in the warehouse in the ownership of plaintiff, the State was forbidden under the Federal statute to levy any assessment. In other words, the issue of sale of one or more of the pieces was entirely immaterial. The immunity ceased after the piece was sold but that did not constitute a waiver as to any of the articles comprised in the shipments still on hand. The lumber had at all times been kept separate and distinct from the general mass of property of the state.

**Decision of District Court of Appeal.**

The opinion of the District Court of Appeal went upon the theory of the taxing authorities, that it is the shipment as a whole of fungible merchandise which constitutes the unit of importation, that whenever sale is made of any part of the total shipment, the original package is broken, the original unit of importation is broken, and the whole property is subject to state taxation. It states:

> "Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapping is the original package. A cargo of planks, timbers, or logs, imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds the invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of Section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber."

Your petitioner here avers that in the brief attached hereto, it will be shown that there is not one case which can be offered in support of the fanciful construction

of this plain constitutional provision such as is made by the decision herein.

The Supreme Court of California denied petition for hearing before it without opinion.

**Reasons for Allowance of Writ.**

Your petitioner respectfully shows that these cases are of vital importance for the Government and State taxing authorities and of importers for the following reasons:

(1) The questions, particularly the first, involved in these cases are ones of exclusively Federal law which have not been finally determined by this court and which with the tremendous increase of foreign commerce of this nation, the current of bulk shipments and the increasing demands of State taxing authorities require final settlement by this court.

(2) The decision of the California Court in this case is in conflict with decisions of the State Courts of Louisiana, Kansas, New York, Missouri, Texas and Michigan as is particularly noted in the brief appended.

(3) The decision of the California Court in this case is in conflict with decision of the Circuit Court of Appeals for the Fifth Circuit as is particularly noted in the appended brief.

(4) The decision of the California Court in this case is in conflict with the trend of decisions of this court as noted in the brief appended.

(5) The decision in this case is and will be of far reaching application as there has been no decision by this Court on the original package rule as applied to

importations of fungible goods, where a part of the total shipment has been sold with the remainder in the hands of the importers.

Your petitioner shows in its brief hereto attached that this case is of great importance on each of the grounds above stated and therein presents the authorities and reasons to substantiate its position and presents herewith a certified copy of the entire record in said cause including trial court, the District Court of Appeal and the opinion of said court.

Wherefore, your petitioner respectfully prays that this Honorable Court order that its Writ of Certiorari issue directed to the District Court of Appeal of the State of California, Second Appellate District, and requiring that it certify to this court a full and complete copy of its proceedings and records in this matter for the purpose of review and revisal and for any other and further adjudication thereof that may to this court seem meet and proper.

Respectfully submitted,

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## PETITIONER'S OPENING BRIEF.

Determination of conflicting theories between the state and federal courts on tax immunity in the importation for sale of foreign fungible merchandise in bulk cargoes is sought by this application for certiorari to the District Court of Appeal of the State of California.

This Honorable Court has never passed upon the precise question here involved. The trend of its decisions, however, has unquestionably indicated that the article rather than the shipment is given immunity under the constitutional provision. The rule of the federal circuit courts has uniformly been in favor of the article rather than the shipment as constituting the original package. The majority rule in the state courts has followed the federal rule. There are, however, two decisions in the state courts which indicate a view that the shipment rather than the article is the original package of import. These two cases are from the Supreme Court of Maine and the California Court in the case at bar.

**The Supreme Court of the United States.**

Starting with the basic premise[1] that "sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part" and advancing to the position[2] that "a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported is a duty on imports within the meaning of the Constitution," the inevitable conclusion of the syllogism is read in[3] "Alabama was powerless without the consent of Congress to tax the nitrate before such sales or to require appellant by the payment of an occupation or franchise tax, or otherwise, to purchase from it the privilege of selling goods so imported and handled.

The uniform decisions of this court have held that it is the "article of import," not the entire shipment which is protected under the constitutional provision. It is likewise the uniform trend of the decisions of this court that no tax can be levied until after change in form or sale. The right to sell and to offer for sale imported merchandise is implied by the act of importation. This was the clear holding of *Brown v. Maryland, supra,* pages 537-448 of *May v. New Orleans* and of *Anglo-Chilean Nitrate v. Alabama.*

The description of the facts in this last case is very like the facts in the case at bar. From the date of qualification to the date of assessment, two years and a

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[1]*Brown v. Maryland,* 12 Wheat. 419, ..... L. Ed. 678.

[2]*May v. New Orleans,* 178 U. S. 496, 44 L. Ed. 1165.

[3]*Anglo-Chilean v. Alabama,* 288 U. S. 224, 77 L. Ed. 710.

half, Anglo-Chilean Nitrate Company was regularly engaged in importing nitrate through Mobile and other ports, by numerous shipments. The nitrate was stored by appellant in its public warehouse. Sales were made from time to time. The amount on hand on March 31, 1930, was the aggregate of the various shipments, less the sales made. The tax was in the form of a franchise tax. Actually, however, under the facts stated, it was an *ad valorem* tax based on the value of the nitrate on hand as the case distinctly states the tax was at the rate of $2 per $1000 assessed value.

*Hooven & Allison Co. v. Evatt,* 324 U. S. 652-64-5, 89 L. Ed. 1252-63.

The opinion of the court states that fibres for use in the regular course of manufacturing requirements consisting of hemp, jute, sisal and others were imported from the Philippine Islands and other foreign points. Unquestionably this indicates that there were various different shipments. The fibres were utilized from time to time in manufacturing, and the Ohio State *ad valorem* tax was laid upon certain bales of hemp and other fibres stored in the original packages in which imported. Unquestionably these were depleted remnants of former total shipments. The particular ruling of the court upon the point in question is found under the heading "II" at the end of page 664. The court there held that the immunity from taxation continued until the goods were actually put to the use for which imported, that it mattered not whether the imported merchandise was stored in the importer's warehouse or in an interior state.

"No opinion of this court has ever said or indicated that imports held by the importer in the orig-

inal package and before they were subjected to the manufacture for which they were imported are liable to state taxation."

Another interesting point of the above case in connection with California law is that the court held therein that the Philippine Islands are not constitutionally united with the United States, although they belong to the United States, and that therefore articles brought from the Philippine Islands into the United States are imports subject to the constitutional provisions relating to imports and exempt from state taxation.

The Supreme Court of the State of California, in the case of *Dant & Russell v. Board of Supervisors,* 21 Cal. (2d) 534, held that goods which are shipped from the Philippine Islands and which come to rest in California are subject to state taxation.

## Circuit Courts of Appeal.

The decisions of the circuit courts of appeal have likewise pronounced on the items composing the shipment as being the original packages of import rather than the entire shipment.

*U. S. v. 65 Casks,* 170 Fed. 449, was a drug misbranding case. The government claimed that the original package was the car which contained the 65 casks. The owner contended that each cask constituted an individual article of import. The Circuit Court of Appeal stated:

> "It seems to be clear that in this case the cask is the original package for the very simple reason that the car was wholly incompetent to package the liquid itself. The cask was a complete entity in itself, not connected or bound up with any other article but

capable of, and in fact, containing, some fifty gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported. Each cask was marked to the consignee and if separated from the car was capable of shipment independent thereof without either loss or inconvenience."

*Galveston v. Mexican Pet.*, 15 F. (2d) 208.

**The State Cases.**

*Lassater v. Purcell*, 2 Tex. Civ. App. 33.

In the case of sacks of flour shipped in carload lots, it was held that the individual sacks were the original packages within the interstate commerce act.

*State v. Winters*, 44 Kan. 728.

In the case of live-stock transferred by the carload, it was held that the individual animals were the original packages, not the car.

**Sales of Portions of the Shipment, Leaving Intact the Remainder in the Original Packages of Import, Do Not Constitute a Waiver of the Constitutional Exemption.**

*State v. Board of Assessors*, 46 La. App. 145, Am. St. R. 318.

In this case the relators were importers of foreign goods. On the tax day they had in stock goods subject to such sales as had been made throughout the year. The City of New Orleans defended on the ground that the relators had by so offering the goods for sale and selling, caused their property to become mingled with the mass

of the property of the state. The court held against this contention as follows:

> "The fact that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages. The immunity from payment of taxes follows the goods without reference to the place in which they are stored. That they are offered for sale in unbroken packages in the importer's store, is not, in effect, a breaking of the package or such disposition of the goods as causes the immunity from the tax to end."

*City of Detroit v. Paper Co.*, 202 Mich. 22-26.

In this case the facts as stated were that shipments of paper were received from Canada in Detroit. The shipments were broken. Some went directly to the customers. The remainder were sent to the warehouse for undetermined sale by rail or motor truck delivery. The court stated:

> "The question presented then is whether the goods had lost the character of imports when the tax was laid and had become a part of the general property of the state, liable to state taxation. When the tax was laid the goods were the property of the defendant or importer in its warehouse in the original form and package in which they were imported; that they had been or would be sold by the importer is true, but the right to sell them goes along with the right to bring them into the country."

**Breaking of Bulk Into Tanks, Bags or Bins, Mixing With Prior Imports or Giving Economic Care to Imported Articles Does Not Constitute a Waiver of the Constitutional Ban.**

*Southern Pacific v. Calexico*, 288 Fed. 639-42. (CALIFORNIA)—FEDERAL DISTRICT COURT.

In this case several different importations were made of baled cotton from Mexico under differing conditions. It is evident that it was a test case to determine the full rights. Some of the cotton bales after entry were compressed for further shipment. The City contended that by this act there was a waiver of the Ban. The Court applied the law to the different tests made and on this point held:

> "The compressing, which it is claimed the cotton suffered, however, did not substantially change the form, aspect or container of the thing imported. True it is that the cover was temporarily removed; but it was almost immediately replaced, and merely for the purpose of enabling the selfsame article, in no wise changed in character or extent, to be compressed into a smaller space that it might be shipped more economically. The agreed statement shows that the baled cotton must be compressed into a smaller space that it might be shipped more economically. The agreed statement shows that the baled cotton must be compressed before it will be accepted for shipment. To hold that it could not be compressed before shipment would be to hold, in effect, that it could not be shipped at all, and, therefore, could not be sold, without being subjected to the burden of the State government."

*Mexican Pet. v. Louisiana,* 173 La. 604-15.

This was a case where Mexican oil was delivered from a tanker into tanks on the shore. The additional feature in this case was that the crude oil was heated so as to make it flow into the storage tanks. It was claimed that this operation caused it to cease its protected character as an import. The case is a thorough review of the course and doctrine of immunity of import from taxation. It cites and relies upon Hamilton Fed. Vol. 1, p. 45; *License Cases,* 5 Howe, 504-75, 12 L. Ed. 256-288; *Sonneborn v. Keeling,* 262 U. S. 506, 67 L. Ed. 1097. Two grades of oil were imported. Each one of the tanks into which it was delivered held at least one thousand barrels of oil theretofore imported. The Court states:

> "It would seem also that the heating of the oil to make it flow, so that it might be pumped into the land tanks from the tanks on the ship is not, within the contemplation of Brown v. Maryland, such an acting upon the thing imported as to incorporate or mix it up with the mass of the property of the country, and the same is true within the contemplation of
>
> *Gulf Fisheries v. MacInery,* 276 U. S. 124.
>
> "Our appreciation of Brown v. Maryland and the authorities cited, resting mainly upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the means of importation, it suffices that the import, to retain its character as such remains in the original form in which imported.
>
> "Some property is of such a physical nature that it is inexpedient, unwise or too costly to import it in packages. It was not the intention, however, to

exclude such property from the immunity of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes or for the manufacture of the important articles of gasoline, kerosene, asphalt or other products. It is obvious that to deprive such importations of their immunity as imports would be a blow to the great oil industry of the state.

"The circumstances of pumping the oil into tanks, in unloading it, containing each about 1,000 barrels of the kind and quality pumped into it—a circumstance which could not be practically avoided in the ordinary course of things—did not cause the oil to lose its character as an import. There was no change here in the oil through a process of mixing, *for the oil put in each tank was identical in kind and grade with that already in it.* Besides, the record justified the conclusion that the *oil already in the tanks was oil imported by plaintiff and still retained its characted as an import and hence there was no mixing of the oil with oil that had become incorporated into the general mass* of the property of the country." (Italics added.)

*In re Taxes,* 32 Hawaii 431.

The taxpayer was engaged in the business of buying and selling materials used as fertilizers by sugar cane plantations. Some of the materials were brought from the mainland of the United States and some imported from South America and from Europe. Only about one-fourth or one-fifth of the material handled during each year was on hand on January 1st, the taxation date. There, therefore, in this case were numerous shipments from foreign

countries from which sales had been made and therefore there were on hand on the tax date "depleted cargoes."

The Court stated:

"Those of the imported materials which were on hand on the taxation date and still in the original bags in which they were imported are clearly within the rule laid down in *Brown v. Maryland*. They were still imports and not within the power of the Territory to tax the phosphate rock so brought in shipment in bulk. It could not have been stored in original packages if it did not come in any packages whatever. It would be an undue stretch of language to say that the ships were the original packages. The test as to the original packages does not apply in such a case. The phosphate rock within the decision of the Maryland case was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk. It was being kept in the warehouse, separate from the general mass of property in this Territory. The sole reason for removal of the nitrate of soda from the bags was as a precaution against fire, there being a peculiar fire hazard resulting from the combination of nitrate of soda and the bags. When subsequently sold these nitrates were again placed in bags and then they were stored in the warehouse of the taxpayer in bulk after removal from the bags. These nitrates were still the property of the taxpayer, had not been sold and were not mixed with the general mass of the property of the Territory. Within the contemplation of the Constitutional provision the nitrates still were, in our opinion, imports."

This case, upon the facts, is very similar to that of the case at bar. The State there claimed that the property had been mixed with the mass of the property of the country. There was much more reason than in the case at bar. The facts show that some of the materials were brought from the mainland of the United States. Certain processing for the maintenance of the security of the property was done in the *Hawaiian* case as it was here. There the nitrate was removed from bags, then replaced in bags when sold. Here the lumber was placed in stacks laid with stickers for preservation. In both cases there were successive shipments and importation and successive sales.

## Opposing State Cases.

The two opposing state cases are found in California and Maine. The California case is that at bar, which goes upon the theory that the total shipment, irrespective of contents, constitutes the original package of import. The Maine case is that of *Mexican Petroleum Corporation v. City of South Portland,* 121 Me. 128, 26 A. L. R. 965.

In this case a tanker of oil came into South Portland from Mexico. The contents were pumped into four tanks on the shore. The court there held that the original package of import constituted the oil and the tank steamer itself; that by reason of the fact that the oil had been pumped from the tank steamer the original package had thereby been broken and the oil thereby mingled with the mass of the property of the state.

The rule of this case has been rejected in the following decisions:

*Philippine Refinery v. Contra Costa,* 24 Cal. App. (2d) 665;

*Great Northern v. State,* 93 P. (2d) 762 (Wash.);

*Galveston v. Mexican Pet.,* 15 F. (2d) 208;

*Mex. Pet. v. La. Tax Comm.,* 173 La. 604, 138 So. 117.

The State Courts have treated the subject under different phases. To clearly outline the cleavage the above grouping under subheads is made. In each instance there was the clear holding that the article rather than the shipment was protected by the Federal bar.

**On Constitutional Questions, Federal Law Governs.**

When constitutional rights or immunities are involved, this court, in cases coming to it from State courts will determine for itself from the record the existence of the controlling facts upon which such constitutional question is based.

*Railroad Comm. v. Texas & P. R. Co.,* 229 U. S. 336, 57 L. Ed. 1215;

*Coombes v. Getz,* 285 U. S. 434, 76 L. Ed. 866;

*Detroit United v. Detroit,* 242 U. S. 238, 61 L. Ed. 268;

*Kansas City Southern v. Albers Commission,* 223 U. S. 573-91, 56 L. Ed. 556-65;

*Truax v. Corrigan,* 257 U. S. 312-25, 66 L. Ed. 254-60;

*First Nat'l Bk. Hartford v. Hartford,* 273 U. S. 548-52, 71 L. Ed. 767-70;

*Fiske v. Kansas,* 274 U. S. 380-5-6, 71 L. Ed. 1108-10-11;

*Norris v. Alabama,* 294 U. S. 587-9-90, 79 L. Ed. 1074-6-7.

**Law and Custom Treat the Individual Plank as the Unit of Trade.**

The rule of law has ever recognized that lumber is dealt with in the individual parcel or piece. The mark or brand placed upon the individual plank, for instance, always has been the visible designation or signature of the maker or exporter. Recognition of the fact that the log, plank, or board is the unit of package in the industry is established by law, which is the codification of the ancient custom and convention of the dealers in lumber is noted in:

Cal. Penal Code, Secs. 356 and 537E;

*Burke v. Cassin,* 45 Cal. 467;

63 Corpus Juris p. 308.

This general rule or custom is recognized in the Federal Statutes dealing with importation.

U. S. Code Title 19, Sec. 1481.

(a) All invoices of merchandise to be "imported into the United States shall set forth * * *"

(b) A detailed description of the merchandise, indicatting the name by which each item is known, the grade or quality, and the marks, number, or symbols, under which sold by the seller or manufacturer to the trade in the country of exportation, together with the marks and number of packages in which the merchandise is packed.

In the case at bar the original package was each individual piece of lumber; that was the identical thing de-

livered by the exporter to the carrier at the initial port of shipment; that was the identical thing carried by the carrier in the original package and delivered; that was the identical thing marked for and which passed through the customs and was received by the importer. There can be no doubt that, had one piece of lumber alone been shipped, it would have constituted the original package and not been subject to taxation. Had two or three or a dozen pieces of lumber been shipped, it is likewise obvious that each individual piece of lumber would have constituted an original package. The fact that there were thousands of individual packages did not change the character of each piece of lumber as an original package.

The "original package of import" is that which, in the customary channels of trade, merchandise is delivered to and carried by the carrier and by it delivered through customs to the importer. In early times, with small sailing ships, a Philadelphia merchant might, in one ship, by one shipment, import merchandise. It came to rest in his warehouse; later a part was sold in Virginia, another part in Georgia and a third part remained for sale in Kentucky. Under the rule announced by the District Court in the case at bar, on the Virginia sale the merchandise would become subject to Pennsylvania taxes and the cost of the merchandise to Georgia and Kentucky thereby increased to maintain the state government of another state. The constitutional debates show the manifest intention that the Federalist commercial states, by just some such means, would subject the Democratic agricultural southern and western states to tax levies.

Consider these shipments of lumber solely as fungible merchandise such as ore, bulk grain, oil, fertilizer. Disregard, as did the District Court of Appeals the identifying

marks of the exporter upon each plank; forget the ancient customs of dealing with lumber. What then is the rule?

Louisiana has said, as above noted, that such property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages and the only practical way is the bulk importation. It is likewise inexpedient, unwise and too costly to transfer the contents of an entire tanker to one land tank. But Louisiana then held that "It is obvious that to deprive such importations of their immunity as imports would be a blow to the great oil industry of the State." Maine and California dissent but Michigan and Hawaii agree; likewise agrees therewith the Federal Circuit Court of Appeals.

## Conclusion.

The States and the Importers are entitled to have a definite answer to the practical questions posed by Mr. Justice Black in his dissenting opinion to the *Hooven & Allison v. Evatt* case. When, if at all, can the State tax imports? He notes that previous opinions of this Court have indicated the difficulties and defects of the original package doctrine. This Court, vested as it is with the high principles of defining and delineating the Constitutional provision, has the duty and responsibility placed upon it of furnishing a definite guide to the practical questions to which this case gives rise.

"Sale is the object of importation." "While they (the lumber parcels) are in the hands of the importer for sale *in the form and shape in which they were introduced and in which they are intended to be sold,* they may be regarded merely as in transit." "A tax in any shape upon imports is a tax upon the consumer, by enhancing the

price of the commodity." "No opinion of this Court has ever said or indicated that imports held by the importer in the original package and before they are subjected to the manufacture for which they were imported are liable to State taxation."

Excerpts are the foregoing from the great decisions which, under the Federal Constitution, control both importer and State. Clearly is it shown under the facts and under the law that the tax levied in those cases were levied upon foreign importations while they were in the original form and shape in which they were imported and intended to be sold. The taxes laid were under the absolute ban of the Federal Constitution; they were subversive of the welfare of the nation and void.

Respectfully submitted,

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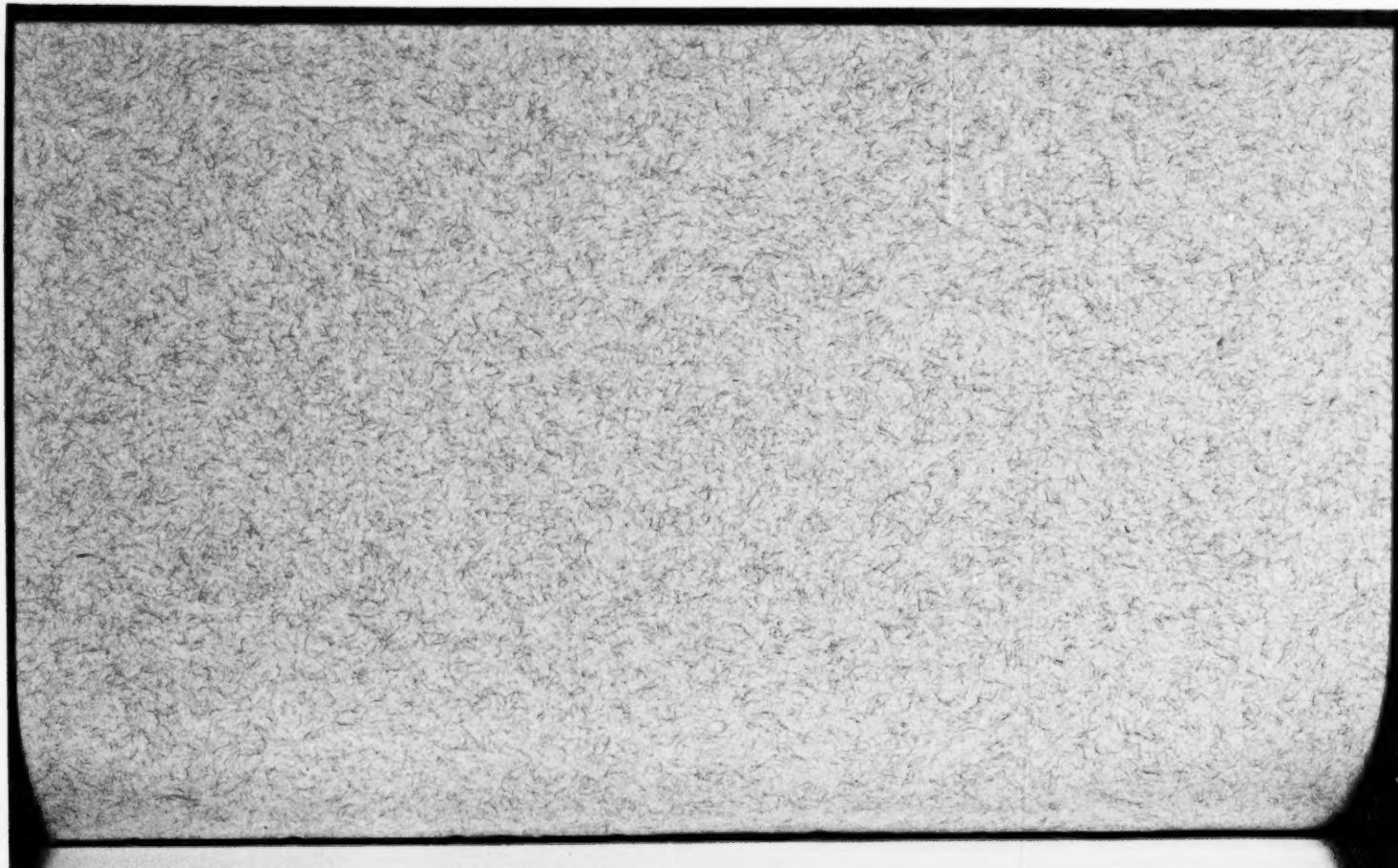

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IN THE

# Supreme Court of the United States

October Term, 1947.
No. 213

E. J. STANTON & SON,

*Plaintiff and Respondent,*

*vs.*

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

*Defendants and Appellants.*

## BRIEF OF DEFENDANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### A.
### Statement of Facts.

The petition for certiorari herein seeks review of a judgment of the District Court of Appeal of the State of California. The judgment became final with the denial of hearing by the State Supreme Court, May 17, 1947.

The opinion by the District Court of Appeal sets forth the following:

> "Respondent has been for fifty years engaged in the wholesale and retail lumber business in Los Angeles County. One of its activities has been the importation of hardwoods from Central and South American republics, Australia, the Philippines, and

other Oriental lands. Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill; lumber of different shipments was kept separate. After being so placed in the storage yard the lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the 'broken lots' remaining after sales had been made from a cargo were taxed. Some of these remained on respondent's premises at the harbor, while others were transported to its yard at Vernon where it was 'detailed to various bins' in which it was stored after being tallied and sorted. By the method long in use by respondent each shipment is placed in a separate bin where it is segregated for color and thickness. All lumber is measured by board feet except lignum vitae which is measured by weight. It is stacked with laths between the layers of lumber to preserve it from fungus and rot and not to process it. It is not kiln-dried prior to sale. The taxed lumber, says respondent, consisted of 'portions of shipments remaining after sales by plaintiff of portions of the original shipment . . . all lumber was kept in piles where only lumber from one shipper was present . . . The bin depleted

by sales is filled by the addition of more of the same type of lumber from the same importer . . . Lumber is sold from these bins by a carload, a truck load or several carloads. The number of sales from any particular bin varies from a few to a single sale.'" [Tr. of Rec. pp. 43-44.]

## B.
## Position of Defendants.

The petition for certiorari should be denied for the reasons (1) that the petition is based on assumptions of fact not supported by but contrary to the findings of the trial court and to the recitals of the District Court of Appeal, and the writ will not lie to review disputed questions of fact; (2) that petitioner's conduct as to handling and the sale of substantial portions of the lumber had the legal effect of incorporating it into the mass of taxable property in the country; and (3) That no debatable constitutional question is involved.

## I.
## Certiorari Does Not Lie to Review a Disputed Question of Fact.

The petition represents that "no question as to the facts is raised." (Pet. p. 4.) On the contrary, several questions of fact are raised and asserted by the petition contrary to the record. Petition asserts, for example, in its opening statement:

> "Your petitioner is and for upward of forty years last past has been a corporation organized under the laws of California with its principal place of business as an importer and wholesale of lumber in the County of Los Angeles" (*ib.* p. 1).

Beyond this limited representation, petitioner has been and is retailer as well as wholesaler. The findings of fact by the trial court were "that plaintiff is now and for many years last past has been engaged in the general lumber business and, among other things, in the importing of lumber and the sale of such lumber." [Tr. of Rec. p. 31, fol. 39; p. 1, fol. 1.] The District Court so declared on the evidence. [Tr. of Rec. p. 43, fol. 66.] Such too was the earlier representation by petitioner, in its brief to the District Court, where we read "Plaintiff is a corporation and it and its predecessors have engaged in the wholesale and retail lumber business in Los Angeles for upwards of fifty years." (Resp. Br. p. 3.)

The petition recites with respect to the imported lumber that "each piece continued to bear its original import mark of identification and was in the original form as imported. . . ." (Pet. p. 4.) No evidence was introduced and nothing in the record indicates that the marks on the lumber continued or were preserved on the lumber after delivery and after the marks had fully served their purpose. The opinion quotes petitioner as to what that purpose was:

> "Such marks merely identified the producer, who varies them for different shipments. They are put upon the boards to enable the carrier to unload the shipment without mixing the cargoes going to different importers." [Tr. of Rec. p. 48, fol. 75.]

The petition misapprehends the basis of the decision by the District Court. It represents such decision to have turned on a single point because of its statement that "The controversy revolves about the question whether upon the sale of a portion of a shipment, the remainder becomes

subject to taxation." This, the petition quotes and then continues:

> "It was the opinion of the District Court that by virtue of such sale the whole unsold shipment remaining in the hands of the importer unchanged in form becomes subject to taxation." (Pet. p. 5.)

This constitutes essential misreading of the decision. It is true that the Court did make the quoted statement. [Tr. of Rec. p. 44, fol. 68.] The decision of the District Court, however, was that the imported lumber was incorported into the mass of taxable property in the country as a result of the conduct of the importer and his treatment of the lumber in two regards: (1) in the grading, piling, separating as to size or color and classifying as to first, second, select and common grades and sorting to make more available for sale, and (2) selling portions thereof. Such two-phase conduct had the effect of discontinuing the import character and constituted the lumber part of the mass of taxable property in the country. The point involved was not merely as to the broad question which "the controversy revolves about", but the narrow question whether petitioner as importer had not so treated the lumber as to incorporate it into the mass of property in the country. The mere fact of sales having been made was not the sole basis of the decision. The two phases were urged by the county and were present, as the opinion indicates when it says:

> "Appellants argue that (1) by the sorting, segregating and tallying of the timbers, and (2) by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation. As

proof of the incorporation of the remnants of shipments into the mass of the county's property it was developed that it might be a number of years before a particular cargo is entirely sold out, and if a few odd pieces are left in a bin a new shipment of the same type from the same producer is put into the same bin." [Tr. of Rec. p. 44, line 68.] (Our numbering.)

The opinion was based on the two aspects of the importer's treatment of the property. Stressing the first phase, the District Court said:

"Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the [fol. 67] lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the 'broken lots' remaining after sales had been made from a cargo were taxed." [Tr. of Rec. p. 43.]

"The conduct of respondent in the grading of the lumber, in piling and separating it with respect to

thickness at the [fol. 76] yards, in keeping the light from the dark, in classifying it as first, seconds, select number 1 and common, and in passing it through two or more sorting operations 'making it readily available for sale' before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

"Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitutional inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer 'otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common [fol. 77] mass, and the law may treat them as it finds them.' . . ." [Tr. of Rec. pp. 48-49.]

The petition misconceives the questions presented, or at least inaccurately and confusedly indicates them in its summary of "Questions Presented." (Pet. p. 6. Petitioner confusedly states the character of the property involved and the items thereof, and erroneously asserts

wrapping and enclosure thereof, all contrary to the facts. The petition represents as the first of the questions presented that

> "(1) a bulk shipment of lumber, (oil, paper, fertilizer, or cattle in regular course of trade) is imported from foreign lands. It is composed of individual pieces, (boxes, barrels, packages or animals) according to ordinary mercantile practices. (The articles comprising said shipment are identified, carried and passed by customs as individual items . . .)" (Enclosing parentheses supplied to indicate erroneous matter.)

Our criticisms of such statement of the question involved are several. The statement misstates the subject matter: the property involved was of course only lumber and not as well any of the other properties mentioned. The lumber was composed, as stated, of individual pieces but not as well of "boxes, barrels, packages or animals." Also, the lumber was not "identified, carried or passed" by the United States Customs by the individual item or by the board or piece. Instead as the opinion of the District Court truly recites:

> "The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) The United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and

the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." [Tr. of Rec. p. 48.]

The petition represents as the second of the "Questions Presented" the question, ". . . does the sale of any one or more of the articles of import, comprised in the total shipment, subject the other articles therein, during the time when they are held in warehouse in their original state of importation by the original owners, to state taxation?" (Pet. p. 6.) Such asserted aspect of "sale of any one or more of the articles" is not according to the facts. Instead the facts are of many sales and mere depleted remnants of imports being left and the taxation then of such remnants or "broken lots." Such "broken lots" also were not held in a "warehouse," but in the petitioner's lumber yards and there offered for sale and sold.

The third of the purported "Questions Presented" which the petition sets forth assumes that petitioner indulged in only such handling of the imported lumber ". . . as is solely essential to the preservation or completion of the mercantile transaction." If by that the petition means the "transaction" of importation, it is clearly in error. The grading, piling, separating as to size, classification, etc., as above indicated were made, not in order to "preserve and complete" the importation but to render the lumber more saleable.

The fourth of the purported "Questions Presented" represents as the fact mere *attempt* to sell *part* and asks ". . . does the mere offering for sale of any one or more

of the articles of lumber . . ." subject the unsold stocks to state taxation? The fact instead, of course, was that petitioner offered *all* for sale, and actually sold the major portion of the imports. The sales may be so many and so large and the depletion may be so extensive as quite to exhaust the entire import. In which case, as the District Court notices, "if a few odd pieces are left in a bin a new shipment . . ." is added. [Tr. of Rec. p. 44.]

The petition represents that the foregoing alleged questions ". . . were duly raised and argued by your petitioners and appellees in said District Court of Appeal." (Pet. p. 6.) To the contrary, those were not the questions stated or raised or argued or determined in the District Court.

On certiorari this High Court will not review the weight of the evidence before the state court. (*Whitney v. People of the State of California,* 274 U. S. 357, 367, 71 L. Ed. 1095, 1102.) The rule is that the decision of the state court upon a question of fact cannot be made the subject of inquiry before this Court. (*Grayson v. Harris,* 267 U. S. 352, 359, 69 L. Ed. 652, 656; *Dower v. Richards,* 151 U. S. 658, 668, 38 L. Ed. 305, 309; *Ward & Gow v. Krinsky,* 259 U. S. 502, 511, 66 L. Ed. 1033, 1036; *Baltimore and Ohio S. W. R. R. Co. v. Burtch,* 263 U. S. 540, 543, 68 L. Ed. 433, 436; *Telluride Power Transmission Co. v. Rio Grande W. R. Co.,* 175 U. S. 639, 645, 44 L. Ed. 305, 308; *Carpenter v. Williams,* 9 Wall. 785, 786, 19 L. Ed. 827, 828, 11 C. J. 204.)

## II.

**Petitioner's Method of Handling the Imported Lumber, Together With Sale of Substantial Portions Thereof, Terminated Any Tax Immunity and Incorporated the Entire Property Into the Mass of Taxable Property in the County.**

After the lumber reached this country, petitioner lumber company classified and graded it according to kind, quantity and condition and assembled and stacked it for more ready sale. Thereafter petitioner made sales from such stacks at wholesale and retail and in quantities varying from a few feet to carload lots. The broken lots thereafter remaining were reassembled and restacked, and further sales therefrom then made. Answer to the constitutional question herein as to the taxability of the imported lumber as between petitioner lumber company and the County of Los Angeles and the City of Los Angeles depends upon such handling of the property by the lumber company and the legal results flowing therefrom. The question is whether, after such handling of the property and such conduct by its owner, the property is still in the original form or package and still entitled to immunity from taxation. The District Court notices the decision in *Brown v. Maryland,* 12 Wheat. 419, 6 L. Ed. 676, and the language of Chief Justice Marshall declaring tax immunity for an import "while remaining the property of the importer while in his warehouse in the original form or package in which it was imported." And the District Court says that "The meaning of his phrase 'original form or package' is determinative of the instant contest. While respondent says each board is a separate package and is in its original form, appellants contend that the 'package'

of lumber is the bulk transported in the ship's hold." [Tr. of Rec. p. 45, fol. 70.]

Petitioner's handling of its import lumber and the resulting incorporation of the lumber into the mass of taxable property in the county are thus stated in the opinion of the District Court:

> "Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the [fol. 67] lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. *Only the 'broken lots' remaining after sales had been made from a cargo were taxed.*" [Tr. of Rec. p. 43, fols. 66-67.]

The declaration of the District Court as to the legal effect resulting from such conduct is thus stated in the District Court opinion:

> "The conduct of respondent in the grading of the lumber, in piling and separating it with respect to thickness at the [fol. 76] yards, in keeping the li[illegible]

from the dark, in classifying it as first, seconds, select number 1 and common, and in passing it through two or more sorting operations 'making it readily available for sale' before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

"Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitution inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer 'otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common [fol. 77] mass, and the law may treat them as it finds them.' . . ." [Tr. of Rec. pp. 48-49.]

The District Court rejected the contention of the lumber company that each board constituted an "original package." Such idea and such terminology do seem strange. In the District Court opinion, we read:

"The circumstances attending the shipments in question are additional reasons for concluding that the

> several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) The United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." [Tr. of Rec. p. 48.]

The requirement, in the phrase of Chief Justice Marshall, is that the imported property be still "in the original form or package." That involves two features, (1) the package or container, and, more important (2) the contents. Not only must the property be the same package, *i. e.*, be the same in form or shape—it likewise must be all of the property, *i. e.*, the same property in quantity.

The want of jurisdiction in the States over imports in the original form or package and exclusive jurisdiction in the federal government covers, it seems, only an entire import, *i. e.*, in the phrase of Chief Justice Marshall, an import "in the original form or package." The "original form or package" means the property assembled or collected as a unit to be brought into the country. Such property so brought in, only so long as still an entity or unit, will continue beyond the jurisdiction of the state. The complete aggregation of component articles which together enter the country, while they continue to be such aggrega-

tion and while they are still in the "original form or package," are not subject to local taxation. The idea behind the term "original package" is a collection of articles. *The "original package" is the aggregate of the articles constituting the property imported. The reason for packaging, or wrapping, or binding together is to unite or unify the separate articles, as a single import.* Fastening together in a bundle by enclosing container or wrapping or cord is necessary in most cases so as to hold the articles together and to keep them from scattering.

Occasionally, the articles, by reason of their very nature, need no fastening together and are not fastened together or enclosed in any wrapping or container. If unlike the ordinary situation, they are not small in size or light in weight, they will not scatter or become separated. If the articles are large, like iron beams, *or lumber,* it is not necessary to wrap them or fasten articles, the aggregate shipment is the import and this, even though the containing receptacle is inadequate or not fastened or is uncovered.

> "An original package as applied to interstate and international commerce, is a package, bundle, or *aggregation of goods, put up in whatever form,* covering, a receptacle for transportation *and as a unit transported* from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment, in the exact condition in which it was shipped. . . . Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate, or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package and this is true, although each bottle or package is

> separately wrapped in paper labeled 'original package' and marked with the name of the importer, and although the larger receptacle is furnished by the carrier." (15 Corpus Juris Secundum, 310.)

It is not reasonable to conclude that as to a bulk shipment, for example, of fish or coal, that each individual fish or piece of coal is the original "import" in the original form or package.

After sorting and segregation by size and grade, and sales of portions of the bulk shipment received, and commingling of the remaining portions from such shipment with unsold remnants remaining from prior shipments received from the same producer, each piece of coal is not and cannot be the original "import" in the original form or package.

We respectfully submit that in ordinary business practice, whether the product involved is lumber, handled and sold in bulk by the "thousands of board feet", or coal, handled and sold in bulk by the "ton", the unit of import in such bulk import is, in fact, and in law, the shipment, that is, the aggregation of goods as a unit transported, and not a piece of coal or a piece of lumber.

The fallacy of petitioner's contention is further indicated by the fact that if every stick or piece of lumber were an original package, each customer on a sale would be buying one or more original packages and it would be, if not impossible, at least against all custom and business practice ever to reduce the merchandise from such purported original package when it went into commercial circulation. To argue, therefore, that in order to take the merchandise from its original packaged condition one

would have to cut or break up each piece or stick shipped in, is manifestly absurd.

The District Court considers the situations presented by the cases:

> "While no reported case involves the classification of a cargo of lumber, some light may be shed upon it by the adjudication as the original package of sealed cases of beer (Leisy v. Hardin, 135 U. S. 100); casks containing a [fol. 73] dozen bottles of tonic (Extract & Tonic Co. v. Lynch, 226 U. S. 192); crates containing 20 pails each of lard (State v. Armour & Co., 240 U. S. 410); packages containing two or more five gallon cans of gasoline (Askren v. Continental Oil Co., 252 U. S. 444); packages containing three or more barrels and crates enclosing bottles of liquor (Gluckenheimer v. Sellers, 81 Fed. 997). An open box holding bottles of liquor is an original package in interstate commerce. (Collins v. Hills, 77 Iowa 181.) In an action to enjoin a newsdealer from selling a certain publication prohibited from sale it was held that when the newspapers were received by the defendant in bulk or in bundle and placed on the newstand for sale they became commingled with the mass of property in the state. (State *Ex rel* Black v. Deloye, 68 So. 993, 995.) Even though a large receptacle is uncovered, leaving exposed the individual articles such as bales, cartons, crates and cases of dry goods which constitute the shipment, still such receptacle is the original package in contemplation of the constitutional restraint upon local taxation of an import. (11 Am. Jur., p. 55, sec. 60.) The fact that one article in a cargo could be shipped alone does not for that reason render each item in such a shipment a separate, original package. (*In re* Harmon, 43 Fed. 372.) . . ." [Tr. of Rec. p. 47.]

It is not important whether the component elements of the unit importation are boxes or cans, or pails, or bottles, or envelopes; or whether, as here, they are logs and pieces of lumber. It is not important whether the component elements of the unit import are held together by box or basket, or case, or bundled by rope or cord, or whether, as here, merely piled or stacked together. In any such situation the component elements together constitute the import. In the one case a container or wrapping is necessary to prevent their scattering and to indicate the fact of such unit import; in the other case it is not necessary—weight and size and stacking or piling the component elements similarly and adequately indicate the fact of such unit import. The fact of a unit is the important thing—not the method by which indicated. The principle declared equally applies, that the import "in the original form or package," *i. e.*, the unit importation, is the thing which is within the exclusive federal jurisdiction and which may not be taxed by the states. When that original unit is broken, and the property is no longer "in the original form or package," but is, instead, a mere part of the importation, and a fortiori when collected and commingled with the remnants and unsold portions of other imports, the property is no longer the import or "in the original form or package," and is no longer outside the state's jurisdiction to tax. The declaration and decision of the District Court seems entirely sound and in line with the decisions of this Court. *Hooven and Allison Co. v. Evatt,* 324 U. S. 652, 89 L. Ed. 1252, indicates no different conclusion. That decision places imports for manufacture in the same category as imports for sale. The Court there said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and

> lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported . . . or when the original packages in which they were imported are broken . . . but no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation . . ." (p. 1264).

The case did not involve question of the assessment of a remaining portion of an import after depletion by use of portions in a manufacturing process. The dissenting opinion of Mr. Justice Murphy interprets the majority opinion as granting tax immunity to only the undiminished import in storage in the owner's warehouse. As he says:

> "With Mr. Justice Black's view that whatever constitutional tax immunity the merchandise in question may have had was lost by virtue of its storage in petitioner's warehouse pending its use in petitioner's manufacturing operations, I agree. But the Court holds otherwise on that issue" (p. 1278).

Mr. Justice Black interpreted the majority opinion as turning upon the breaking of the imported package for purpose of manufacturing and not as involving or applying to a possible unused portion of an import.

> "Are these fibers to be taxed when the 'reed' which covers them is removed or must the state wait until it can prove that one of the steel bands has been broken? . . . The states are entitled to have a definite answer to these practical questions" (p. 1278).

The opinion was also so interpreted by the annotator thereof in the Lawyer's Edition report. It recites that the decision

> "held that materials imported by a manufacturer, while stored in the original packages in a warehouse at the factory pending their use, retain the character of imports entitled to constitutional immunity from state taxation, but that such immunity ceases when they are subjected to the manufacture for which they were imported or when the original packages in which they were imported are broken."

Yet the petition herein states petitioner's contrary idea, to wit, that in *Hooven and Allison Co. v. Evatt* "unquestionably these were depleted remnants of former total shipments." (Pet. p. 13.) The sentence immediately preceding such conclusion is inconsistent therewith, and the petition says:

> "The fibers were utilized from time to time in manufacturing and the Ohio State ad valorem tax was laid upon said bales of hemp and other fibers stored in the original packages in which imported" (*ib.* p. 13).

In support of its contention that lumber is dealt with in the individual parcel or piece and that the log, plank or board is the unit of package in the industry, appellant cites (Pet. and Br. p. 23), 63 Corpus Juris, page 308, which is the beginning of the article on trademarks and trade names, California Penal Code Sections 356 and 537e, which relate to the defacing of marks of ownership on certain materials; and the case of *Burke v. Cassin,* 45 Cal. 467, a decision relating to the pirating of a trademark, in which not one single mention is made of lumber or boards in any shape or condition whatever. We think it unnecessary to make any extended argument that such authorities are in no wise applicable to the problem before this Court.

III.

**No Debatable Constitutional Question Is Involved.**

In view of the previous decisions of this Honorable Court upon the subject no debatable constitutional question is presented. The facts bring this case squarely within the rule of *State v. Armour and Company,* 240 U. S. 510; *Purity Extract and T Company v. Lynch,* 226 U. S. 192; *Austin v. Tennessee,* 179 U. S. 343, and *May v. New Orleans,* 178 U. S. 496.

**Conclusion.**

In a case involving the taxability of imported property, the question raised may be one or more of the three following, to wit:

(1) Was the property imported from a foreign country?

(2) Was the property still in its original form or package?

(3) Was the property still in the hands of the original importer?

In the present case the issue is on the second question alone, viz., whether plaintiff's taxed lumber was yet in the original form or package. (There is no issue on (1) that the lumber entered the country as an import, or on (3) that the lumber was still in the hands of the original importer.)

The imported lumber lost its original exempt status and became taxable by reason of its incorporation into the mass of property in the country. Such incorporation resulted from the importer's treatment of it in at least two particulars. First, by processing which preserved and conditioned

it and rendered it more valuable and more saleable; second, by sale of portions of the lumber and commingling together the balance according to thickness, kind, quality, grade and color. By reason of these acts of plaintiff the lumber became taxable as a part of the mass of property in the country.

The lumber imported by plaintiff from foreign countries was by plaintiff *after arrival in this state* subjected to certain processes to render it marketable in its business and thus more saleable and more valuable. The lumber arrived in this country on vessels. It was transported and was unloaded in compact, intact shipments. Upon being unloaded at the docks in Los Angeles it was tallied by plaintiff's employees and sorted and segregated in four ways: (1) by sorting out the split and otherwise damaged lumber; (2) by sorting it as to the various thicknesses; (3) by sorting it as to grades; and (4) by sorting the Philippine mahogany according to color. Then the lumber, as so sorted, was segregated by thickness and by grade, was piled in bins in the plaintiff's lumber yard and place of business and offered for sale by plaintiff in its retail and wholesale lumber business.

We submit that the plaintiff's lumber herein taxed was no longer an original import, nor as such removed from the jurisdiction of the County and City to tax; instead, that plaintiff's operations with regard to and handling of lumber after arrival in this country, consisting of tallying and sorting and arranging it for preservation and conditioning and in preparing and readying it for sale, had the effect of incorporating and mixing it up with the mass of taxable property in the county.

Further, it would seem clear that the sale and withdrawal and delivery to purchasers at wholesale and at retail of portions of the shipments and collecting and commingling for sale of the remnants and remaining portions left from different shipments must have had the effect of incorporating the same into the mass of taxable property in the country and of dissipating the tax immunity theretofore clothing each shipment so long as it remained entire and intact as an original import in the hands of the original importer.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 213.

E. J. STANTON & SON,

*Plaintiff and Petitioner,*

*vs.*

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

*Defendants and Respondents.*

## PETITIONER'S ANSWERING BRIEF.

The California decision in the case at bar deprives plaintiff of a fundamental right secured by specific constitutional provision. This was asserted in the petition and not denied by respondent. The respondent's brief is rather a plea of confession and avoidance. The conflict between the decision of the California court in the case at bar with the decisions of the Federal Circuit Courts of Appeal and with the decisions of six other state courts is asserted by the petition. This respondent does not deny. Never has this court passed upon the immunity of an importation of fungible goods when a part has been sold. This is a vitally important question in the import-export trade. Respondent does not deny this. Mr. Justice Black has stated that a definite answer should be given to the importers and to the taxing authorities of the states.

## I.

## The History of the Rule in California.

The importance of the decision by this court is emphasized by the variance of the case at bar from former California decisions.

*Imperial Dev. Co. v. Calexico,* 47 Cal. App. 666;

*Imperial Dev. Co. v. Imperial Co.,* 47 Cal. App. 794.

From the reading of the opinion of these cases it appears that cotton and boles were imported at different times from Mexico. At all times the imports were open for sale and sales made. The court held this to be immaterial so long as the goods were marked for identification and in the original package "under such circumstances it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the importer."

*So. Pac. v. Calexico,* 288 Fed. 639;

*Phil. Ref. v. Contra Costa,* 24 Cal. App. (2d) 665.

Cocoanut oil was stored at San Pablo as a result of four different importations. Deliveries made to various purchasers. Held tax exempt under the Federal Constitution. The court therein relied upon:

*Carson Petroleum v. Vial,* 279 U. S. 95, 73 L. Ed. 626;

*In re Taxes,* 32 Hawaii 431;

*Galveston v. Mex. Pet.,* 15 F. (2d) 208.

The last two cases are discussed in petitioner's opening brief. The *Galveston* case flatly distinguished the theory of the *Maine* case. It is reasonable to conclude that California thereby took its stand with those states and courts adverse to the theory that the entire shipment is considered as the "original package of import."

*Johnson v. Los Angeles,* 31 Cal. App. (2d) 579.

In this case the imports held tax exempt were an aggregate of imports over the period of a year, of twine, rope and cordage deposited in plaintiff's warehouse. Evidently there was no total shipment involved, but broken remainders of various shipments.

*Dant & Russel v. Board of Supervisors,* 21 Cal. (2d) 534.

The facts in this case were similar to that of the case at bar. Lumber from the Philippines the result of various importations over a period of three years, diminished by sales, was stacked in piles in a warehouse yard. Suit was to recover taxes paid. The case was heard upon demurrer to a complaint. Decision was for the county in the trial court. The District Court of Appeal reversed in decision noted at 128 P. (2d) 389 (not in official reports) and held:

> "It is our opinion that the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the car-

rier at the initial point of shipment and it so remained at all times here in question. There can be no doubt that, had one piece of lumber alone been shipped, it would have constituted the original package and not been subject to taxation under the facts set forth above. Had two or three or a dozen pieces of lumber been shipped, it is likewise obvious that each individual piece of lumber would have constituted an original package. The fact that there were thousands of individual packages did not change the character of each piece of lumber as an original package."

The California Supreme Court, in its decision above noted, held that inasmuch as the lumber came from the Philippine Islands and the Islands were a possession of the United States, the lumber did not come from foreign lands and was not imported. The rule under the import-export clause of the Federal Constitution did not apply, but the rule in the Interstate Commerce Clause did apply. The lumber admittedly had come to rest. It was therein held that it thereby became subject to the state tax. The decision did not at all deal with any of the points determined by the Appellate Court decision. The actual effect of this case was to forecast the decision in the case at bar.

## II.

## Respondent's Erroneous Views.

The respondent's brief was evidently prepared by new counsel who evidently had no time to examine the findings, evidence or exhibits. For this reason he has made statements which were not quite in accord with the facts at issue and has found it necessary to pad his brief with identical excerpts from the decision. His errors in this respect are noted.

*Evidence as to Marks:* The fact that each parcel of lumber at the time of the tax bore the identification marks of the exporter is alleged in the complaint [Tr. p. 3, par. 3] also Exhibit A [Tr. p. 11]. This was not denied in the answer. It was found, in accordance with the admission of the pleadings, to be true in the Findings. [Tr. p. 32, par. 3]. Petitioner's statement is correct. It is borne out likewise by the exhibits produced in evidence.

*The Grounds of Decision:* The rather ambiguous holding of the court may well be thought to embrace two grounds. The ground which respondent emphasizes is at flat variance with the findings of the trial court [Tr. p. 35]:

> "That until and on said 3rd day of March, 1941, each of said parcels of lumber remained the property of plaintiff in the original form of package in which it was imported as aforesaid and in which said parcels of lumber were delivered to the carrier by the consignor as aforesaid, and in which they were carried by the carrier as aforesaid from the respective dates of importations to the respective points whence said importation was made and was particularly identified in said location by said marks upon said lumber placed thereon by the consignors as aforesaid and by the location allotted for the storage of said lumber; that

said marks of identification upon said lumber showed, among other things, that it was the product of the Philippine Islands, Thailand, Australia, Guatemala and Ecuador, respectively; that at all times said lumber was stored separate and apart from and not mixed or mingled with any other than single, original packages of importation or importations of lumber theretofore made from the respective shippers, respectively, from the Philippine Islands, Thailand, Australia, Ecuador or Guatemala, as the case may be; that is to say, there was no intermingling with importations from the respective foreign ports of origin; and the lumber from each of said foreign ports of origin was kept separate and apart from any other lumber; that no change has been made in the form of said lumber since it was unloaded from the steamship carriers; that said lumber has not been offered for sale and had not been sold; that the destination of said lumber within or without the State of California was undetermined; that said lumber on said 3rd day of March, 1941, had not been incorporated into the mass of the property within said State of California; that no change had been made in the form of said lumber since it was unloaded from the steamship carriers; * * *"

These findings are intrenched in the undenied allegations of the complaint. The answer solely put into issue the point that lumber had been sold from the stacks and the total shipment broken.

*The Questions Presented:* These obviously refer to all fungible importations and present the general aspects for the decision. Each of these questions, in so far as the case at bar is concerned, obviously refer to and include only the lumber importation in question.

*The Passage Through the Customs by Package:* The statement contained in the petition is proven adversely to the respondent's contention by the documentary exhibits of the shipping papers. These documentary exhibits were in the form prescribed by the customs code noted in the opening brief.

*The Sale or Offer for Sale:* As noted in the excerpt from the findings, there was no evidence introduced of the sale or offering for sale of any one or any part of the lumber on hand. Views of the respondent are entirely his own and not based upon any evidence produced.

*The Processing:* As noted in the quoted findings, there was no processing. In fact, oral testimony was that the newly imported lumber was sold for exactly the same as that which had been in stacks.

*The Commingling:* As noted by the Findings in the trial court, there was no commingling.

*The Transportation:* Careful inspection of the oral evidence shows that there was no evidence whatsoever as to the manner in which the shipments were maintained and whether packed, unpacked or otherwise. There was documentary evidence as noted in the opening brief that shipments from three importers were combined in one import and one shipment was broken prior to customs entry.

*The Sorting for Grade, Thickness and Color:* The sole evidence was both documentary and oral, that the sorting for thickness, grade and color was made, in conformity to the invoices, by the exporter as necessary to pass through customs. The marking on the planks, placed by the exporter, indicated their quality and color. Upon arrival this original sorting was merely checked by the importer.

## III.

**Deprivation by Said Court of the Fundamental Constitutional Right Vests This Court With the Power to Review the Evidence and Reach Its Own Conclusions.**

This point was noted in appellant's opening brief, page 22. The respondent's brief refers rather to diversity of citizenship cases. This court has recently epitomized its holding in the late case of *Fay v. New York,* Vol. 91, Adv. Sheets, p. 1517:

> "We would in any case be obliged, on a constitutional question, to reach our own conclusions after full allowance of weight to findings of said case, and in this case must examine the evidence."

The respondents here rest upon a ground which was not placed in issue in the pleadings or in the trial court. The sole issue there was the break in the original shipment, plaintiff maintaining that each plank constituted an original package, the taxing authorities contending that the entire shipment constituted the original package. The trial court held in accordance with petitioner's theory and further held, as noted above in the excerpt from the findings, that each plank was in the exact condition as delivered by the exporter to the carrier, as carried by the carrier and delivered through customs to the importer. As stated under the doctrine of *May v. New Orleans,* 178 U. S. 496, each plank was the original package of import. The theory of respondent was dispelled by the documentary evidence produced, which has been above noted, showing the manner in which the shipments were originated, marked and imported through customs.

Under this situation, petitioner agrees with respondent that a determination of this court is needed. It is to be noted, however, that the cases cited by respondent under their paragraph 3, page 21, relate, as to the first three shipments to the interstate commerce rule, and are not at all helpful in a case arising under the interpretation of the section relating to the immunities upon importations. The case of *May v. New Orleans, supra,* is directly contrary to the contention of respondent in that the holding of that case was to the effect that the original package of import is that which is utilized by the carrier in transporting merchandise and delivering it into this country.

## Conclusion.

The questions here presented are of that National importance which requires the determination of the final Constitutional arbiter. The issues are clean-cut and definite. There is a radical division among the States and Courts upon diametrically opposed theories. The expanding foreign commerce of the Nation collides more and more with the increasing State tax requirements; the State taxing authorities encroach more and more upon the resources reserved to the Nation. All of these needs coalesce into an insistent demand for the reasoned opinion of the High Court.

Respectfully submitted,

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By .....

and

STANTON & STANTON,

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